NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JULIUS GORE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 36 EDA 2013

Appeal from the Judgment of Sentence December 10, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009188-2012

BEFORE: FORD ELLIOTT, P.J.E., BOWES, and SHOGAN, JJ.

MEMORANDUM BY BOWES, J.: **FILED JUNE 23, 2014**

Julius Gore appeals from the judgment of sentence of one year and nine months to three years and six months incarceration followed by two years of probation imposed by the trial court after it found Appellant guilty of possession with intent to deliver ("PWID") cocaine and marijuana. We affirm.

Officer Felix Nosik received information that narcotics transactions were occurring outside of Jay's Big Shot Bar, a local establishment in Philadelphia located at Stenton Avenue and Narrangasett Street. After receiving this information, Officer Nosik began to conduct undercover surveillance, along with his backup officer, Officer John Ellis. While observing the area, Officer Nosik witnessed a black female approach Appellant. The woman handed Appellant money. Appellant reached into his

pocket and provided the woman with a small object in exchange for the money. Officer Nosik could not specifically identify the item that was exchanged. However, Officer Nosik, having been a Philadelphia police officer for fourteen years and having made over 1000 drug arrests, concluded that a hand to hand drug transaction had transpired. Accordingly, he requested Officer Ellis to stop Appellant.

Officer Ellis effectuated the stop and the officers arrested Appellant. Upon searching Appellant's person, Officer Ellis retrieved eighty nine dollars. Officer Nosik also discovered three packets of crack cocaine in Appellant's jacket. At police headquarters, an additional search of Appellant's person recovered from his waistband area a plastic bag containing marijuana. Following the unsuccessful litigation of a suppression motion, Appellant waived his right to a jury trial and proceeded to a non-jury trial. The court found Appellant guilty of both PWID cocaine and marijuana, as well as possession of those same substances. Thereafter, the court sentenced Appellant to the aforementioned periods of incarceration and probation. Appellant timely appealed.

The court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. It also granted an extension based on the notes of testimony being unavailable. Due to an apparent breakdown, the trial court did not receive Appellant's concise statement and issued an opinion finding Appellant's claims waived. Appellant sought relief from this Court, which we granted so as to allow the

trial court to substantively address Appellant's issues. The court authored its opinion and the matter is now ready for our review. Appellant presents one issue for this Court's consideration.

> Where appellant apparently sold an unknown type of drug to another person, and then was found in possession of both marijuana and cocaine, each in an amount consistent with personal use, was it not impermissible for the trial court to guess that the drug delivered by appellant was cocaine, rather than marijuana, and convict and sentence for the more serious type of controlled substance, cocaine?

Appellant's brief at 4.

Appellant's challenge relates to the sufficiency of the evidence. In analyzing a sufficiency claim, "we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." ***Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa.Super. 2012). The Commonwealth can meet its burden "by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Id***. This Court cannot "re-weigh the evidence and substitute our judgment for that of the fact-finder." ***Id***. Additionally, "the entire record must be evaluated and all evidence actually received must be considered." ***Id***.

Further, we must draw all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. ***Commonwealth v. Hopkins***, 67 A.3d 817, 820 (Pa.Super. 2013). "Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." ***Brown***, ***supra*** at 323. "[T]he evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." ***Id***.

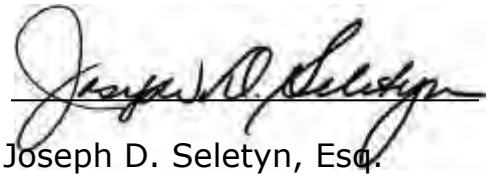
Appellant argues that the trial court impermissibly guessed as to which drug Appellant delivered. He contends that the amount of both the marijuana and cocaine was alone insufficient to show that he intended to deliver those drugs. Appellant points out that the Commonwealth did not present expert testimony and asserts that the court's inference that he possessed the cocaine with intent to deliver was speculative. In this respect, Appellant claims that it was equally reasonable that Appellant delivered marijuana and not cocaine.

The Commonwealth has neglected to file a timely brief in this matter; accordingly, we are left without any advocacy on the part of the prosecution. We remind the Commonwealth of its limited obligations as an appellee and disapprove of the Commonwealth's failure to timely submit a brief. Nonetheless, we agree with the trial court that the Commonwealth introduced sufficient evidence to prove PWID cocaine.

Appellant confuses the Commonwealth's inability to prove an actual delivery of cocaine, with proof of intent to deliver. Here, the logical inferences derived from the evidence viewed in a light most favorable to the Commonwealth supports a finding that Appellant intended to sell both cocaine and marijuana. Police observed Appellant deliver a drug to a purchaser. Police recovered both cocaine and marijuana from Appellant after witnessing him in a hand-to-hand transaction. Appellant possessed eighty-nine dollars of cash on his person. He did not have paraphernalia that would be used to consume the drugs on his person. This evidence is not so weak and inconclusive that no probability of fact can be drawn from the circumstances. That Appellant may have delivered marijuana does not mean that he also did not intend to sell the cocaine he possessed. This case does not involve mutually inconsistent inferences or two opposing propositions as maintained by Appellant. Rather, the evidence supports the consistent inference that Appellant possessed and intended to deliver illegal drugs, including marijuana and cocaine.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/23/2014